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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDRE JOHNSON,

Defendant and Appellant.

F077491

(Super. Ct. No. CF98612873)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Jonathan B. Conklin, Judge.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Caely E. Fallini, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Detjen, J. and Smith, J.

Appellant Andre Johnson was resentenced by the trial court pursuant to Penal Code section 1170.126.¹ On appeal, Johnson contends: (1) the matter must be remanded for the court to conduct a hearing on his *Romero*² motion; (2) his abstract of judgment contains a clerical error; and (3) two of the fees the court imposed must be stricken. We find merit to Johnson's third contention and will strike the fees. Johnson's first two contentions, however, are moot because the court erred in sentencing him and we will remand for resentencing which will allow Johnson to make a *Romero* motion and the court to correct any errors in his abstract of judgment. In all other respects, we affirm.

FACTS

Background

Between March 28, 1997, and March 31, 1997, Johnson burglarized the Dole Dried Fruit and Nut Company. He was subsequently found in possession of computer equipment that was stolen from the company. On August 1, 1997, Johnson robbed the owner of Fresno Gold and Silver at gunpoint. On August 13, 1997, he robbed three employees of the Pull and Save Recycle Center at gunpoint.

In 1998, a jury convicted Johnson on two counts each of second degree robbery (§§ 211 & 212.5, subd. (c)/counts 1 & 3), receiving stolen property (§ 496, subd. (a)/counts 2 & 7),³ false imprisonment (§ 236/counts 4 & 5), and one count each of second degree burglary (§ 459/count 6) and possession of a firearm by a felon (former §12021, subd. (a)(1)/count 8). Additionally, the jury found true personal use of a firearm enhancements (§ 12022.5, subd. (a)(1)) in counts 1, 3, and 5, and Johnson admitted four serious felony enhancements (§ 667, subd. (a)) and allegations that he had four prior convictions within the meaning of the "Three Strikes" law.

¹ All further statutory references are to the Penal Code unless otherwise noted.

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

³ Count 2 was subsequently stricken on appeal.

On October 23, 1998, the court struck two of the serious felony enhancements and sentenced Johnson to a determinate term of 22 years and an indeterminate term of 175 years to life.

On July 23, 2014, pursuant to section 1170.126, Johnson filed a pro se petition to recall sentence.⁴

On August 13, 2014, pursuant to section 1170.126, Johnson filed a second petition for recall of sentencing that may have included a request for a *Romero* hearing.⁵

On August 19, 2014, the court issued an order provisionally finding that Johnson was eligible for resentencing on counts 4, 6, 7, and 8, but ineligible on counts 1, 3, and 5, and it appointed counsel to represent Johnson. The order did not mention anything about a *Romero* hearing.

On September 25, 2015, the district attorney filed a letter brief in which he conceded Johnson was eligible for resentencing on counts 4, 6, and 7, but argued that the modification to Johnson's three strike sentence did not "authorize a *de novo* sentence that would involve the court's potential exercise of discretion under [*Romero*]"

On November 2, 2017, defense counsel filed a reply brief in which he agreed that Johnson was eligible for resentencing on counts 4, 6, and 7, but argued that the court could reconsider his entire sentence. Defense counsel also requested that the court order the preparation of a new probation report to assist the court in resentencing him, including in its decision whether to strike any of his strikes pursuant to *Romero, supra*, 13 Cal.4th 497.

⁴ The proof of service indicates that Johnson served the district attorney with an ex parte notice of motion and an application requesting that his restitution fine be waived or modified.

⁵ The proof of service for the petition states that the district attorney was served with the petition and a request for a *Romero* hearing. The record, however, does not contain any documents relating to Johnson's request for a *Romero* hearing in 2014.

On March 15, 2018, Johnson filed a pro se peremptory challenge against the judge presiding over his motion.

On March 22, 2018, Johnson filed a pro se motion for a new trial.

On March 27, 2018, the court denied Johnson's peremptory challenge.

On April 9, 2018, Johnson filed a *Faretta*⁶ motion asking the court to allow him to represent himself.

At a hearing on April 13, 2018, the court granted Johnson's *Faretta* motion. The court also tentatively ruled that Johnson was eligible for resentencing on counts 4, 6, and 7. However, it stated that the other remedies Johnson was seeking were outside the scope of the resentencing. During the hearing, the district attorney argued that because the court was obligated to impose a second strike sentence, the court did not have discretion to strike Johnson's strike convictions. After Johnson commented about certain sentencing issues, the court reiterated that the hearing was not a "resentencing hearing." Before the hearing concluded, the court handed Johnson a copy of a supplemental probation report, stated it intended to resentence Johnson as recommended in the report,⁷ and continued the matter.

On April 20, 2018, Johnson filed a motion to strike one of his prior strike convictions.

On April 25, 2018, Johnson filed a motion to strike the enhancement punishment for the serious felony and arming enhancements, a motion for a new trial on counts 3, 4, and 5, and a motion for a new trial on his conviction for robbery in count 1.

⁶ *Faretta v. California* (1975) 422 U.S. 806.

⁷ The probation report recommended a determinate term of 19 years four months and a consecutive indeterminate term of 75 years to life.

On May 3, 2018, the court acknowledged receiving several motions from Johnson and it again stated that the purpose of the hearing was to consider resentencing him only on the “applicable counts.” The court also stated:

“So the record is clear, each of the motions is denied, ... essentially, on procedural grounds, timeliness grounds, and even if I had the discretion to grant I would not. But I’m just trying to make a record [that] I’ve read them. I’ve considered them. I’m denying them as outside the parameters of the issue before the court.”

During argument, the district attorney again argued that the purpose of the hearing was limited and did not allow the court to consider a *Romero* motion, striking enhancements, or other motions that might be made in a de novo sentencing hearing.

After hearing further argument from Johnson, the court sentenced him on count 1 to an aggregate, indeterminate term of 39 years to life, 25 years to life on his robbery conviction in that count, two five-year serious felony enhancements, and a four-year arming enhancement. On counts 3 and 5, the court imposed consecutive aggregate, indeterminate terms of 29 years to life, 25 years to life on the substantive offense in each count and a four-year arming enhancement on each count. On count 8, the court imposed a concurrent aggregate 25 year-to-life term. The court also imposed an aggregate, determinate term of seven years four months on the remaining counts—a doubled aggravated term of six years on count 4, a 16-month term on count 6 (a doubled one-third the midterm), and a concurrent, doubled, aggravated term of six years on count 7.

DISCUSSION

The Alleged Failure to Consider Johnson’s Romero Motion

Johnson contends remand is necessary to allow the court to consider his *Romero* motion, and that it must include directions to the trial court to consider striking the serious felony and firearm enhancements and the applicability of section 654 to his sentence. Respondent contends the court already considered and denied Johnson’s

Romero motion, his motion to strike the enhancements, and whether to stay any part of his sentence. These contentions are moot because the court imposed an unauthorized sentence and we will remand the matter for resentencing.

“The Three Strikes law was enacted in 1994 ‘to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.’ [Citation.] Under the law, defendants who commit a felony after two or more prior convictions for serious or violent felonies were sentenced to ‘an indeterminate term of life imprisonment with a minimum term of’ at least 25 years. [Citation.] In 2012, Proposition 36 narrowed the class of third strike felonies for which an indeterminate sentence could be imposed. Now a defendant convicted of a felony outside of that class can receive at most a sentence enhancement of twice the term otherwise provided as punishment for that felony. [Citation.] ...

“Proposition 36 also authorizes an inmate currently serving an indeterminate term under the original Three Strikes law to petition the trial court for resentencing. (§ 1170.126, subds. (a), (b).) Upon receiving such a petition, the trial court ‘shall determine whether the petitioner satisfies the criteria’ for resentencing eligibility, including whether the petitioner’s third strike offense was neither serious nor violent. (§ 1170.126, subds. (e), (f).) If the petitioner is found eligible for resentencing, he or she ‘shall be resentenced pursuant to [Proposition 36] unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.’ (§ 1170.126, subd. (f).)” (*People v. Perez* (2018) 4 Cal.5th 1055, 1061–1062.)

It was undisputed in the trial court that pursuant to Proposition 36, Johnson was eligible for resentencing on his convictions for false imprisonment in count 4, second degree burglary in count 6, and receiving stolen property in count 7.

“When a sentence is subject to ‘recall’ under section 1170, subdivision (d),^[8] the entire sentence may be reconsidered. A case so holding reasoned that this was true because ‘When a case is remanded for resentencing by an appellate court, the trial court is entitled to consider the entire sentencing scheme. Not limited to merely striking illegal portions, the trial court may reconsider all sentencing choices. [Citations.] This rule is justified because an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components. The invalidity of one component infects the entire scheme.’ [Citations.]

“Proposition 36, too, provides for a ‘recall of sentence’ upon a timely petition. (§ 1170.126, subd. (b).) We see no reason why a ‘recall’ of sentence under Proposition 36 should not be treated as akin to a ‘recall’ of sentence under section 1170, subdivision (d). Presumably, the voters were aware of the meaning of the term ‘recall’ as

⁸ Section 1170, subdivision (d)(1) provides: “When a defendant subject to this section or subdivision (b) of section 1168 has been sentenced to be imprisoned in the state prison or a county jail pursuant to subdivision (h) and has been committed to the custody of the secretary or the county correctional administrator, *the court may, within 120 days of the date of commitment on its own motion*, or at any time upon the recommendation of the secretary or the Board of Parole Hearings in the case of state prison inmates, the county correctional administrator in the case of county jail inmates, or the district attorney of the county in which the defendant was sentenced, *recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced*, provided the new sentence, if any, is no greater than the initial sentence. The court resentencing under this subdivision shall apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing. The court resentencing under this paragraph may reduce a defendant’s term of imprisonment and modify the judgment, including a judgment entered after a plea agreement, if it is in the interest of justice. The court may consider postconviction factors, including, but not limited to, the inmate’s disciplinary record and record of rehabilitation while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the inmate’s risk for future violence, and evidence that reflects that circumstances have changed since the inmate’s original sentencing so that the inmate’s continued incarceration is no longer in the interest of justice.” (Italics added.)

used in criminal sentencing, and of judicial decisions applying that term.” (*People v. Garner* (2016) 244 Cal.App.4th 1113, 1118.)

It is clear from the foregoing that the court and the district attorney were wrong that the court could not consider the entire sentencing scheme when it resentenced Johnson pursuant to Proposition 36.

Moreover, “ ‘ “[w]hen a court pronounces a sentence which is unauthorized ... , that sentence must be vacated and a proper sentence imposed whenever the mistake is appropriately brought to the attention of the court.” [Citation.] “When an illegal sentence is vacated, the court may substitute a proper sentence, even though it is more severe than the sentence imposed originally”. [Citations.]’ ” (*People v. Martinez* (2015) 240 Cal.App.4th 1006, 1015.)

In *People v. Williams* (2004) 34 Cal.4th 397, the Supreme Court held that “under the Three Strikes law, section 667[, subdivision] (a) enhancements are to be applied individually to each count of a third strike sentence.” (*Id.* at p. 405.) However, they should only be added once to the determinate portion of a defendant’s sentence. (*People v. Sasser* (2015) 61 Cal.4th 1, 17.) Thus, the court imposed an unauthorized sentence when it resentenced Johnson because it imposed the serious felony enhancements only on one indeterminate count and not on the determinate portion of his sentence and we will remand for resentencing. Further, in view of the foregoing, we need not determine whether the court’s comments indicate that it considered Johnson’s *Romero* motion, whether to strike any of the enhancements, or the applicability of section 654 to his sentence because on remand for resentencing Johnson will have the opportunity to raise these issues.

The Error in Johnson’s Abstract of Judgment

Johnson contends his abstract of judgment for indeterminate terms erroneously indicates that the court imposed a concurrent indeterminate term of 25 years to life on

count 5 and a consecutive indeterminate term of 25 years to life on count 8. Although Johnson is correct, the issue is moot because the court will have a chance to correct these errors when it resentences Johnson and issues an amended abstract of judgment.

The Court Fees

The court imposed \$280 in court operations fees (§ 1465.8) and \$210 in criminal conviction fees (Gov. Code, § 70373). Johnson contends the court erred in imposing these fees because his convictions predated the enactment of the statutes that authorized them. Respondent concedes.

Section 1465.8, which authorizes the collection of a court security fee for each conviction, was enacted in 2003 (Stats. 2003, ch. 159, § 25). “[Its] legislative history supports the conclusion the Legislature intended to impose the court security fee to all convictions after its operative date.” (*People v. Alford* (2007) 42 Cal.4th 749, 754.) Government Code section 70373, which authorizes the collection of a criminal conviction fee, was enacted in 2008 (Stats. 2008, ch. 311, § 6.5) and is not retroactive to convictions that predate its enactment. (*People v. Davis* (2010) 185 Cal.App.4th 998, 1000.)

Johnson was convicted in this matter in 1998. Thus, we agree with the parties that the court erred when it imposed court operations fees totaling \$280 and criminal conviction fees totaling \$210 because the statutes that authorized these fees were enacted after he was convicted in the instant matter.

DISPOSITION

The \$280 in court operations fees the court imposed pursuant to Penal Code section 1465.8 and the \$210 in criminal conviction fees the court imposed pursuant to Government Code section 70373 are stricken. Additionally, the sentence is vacated and the matter is remanded to the trial court for resentencing. In all other respects, the judgment is affirmed.